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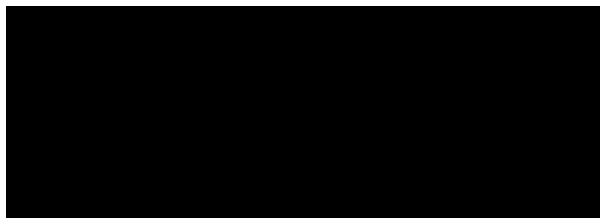
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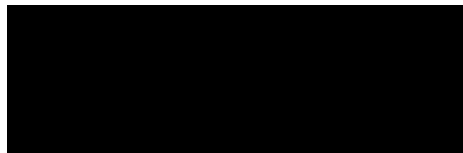


U.S. Citizenship
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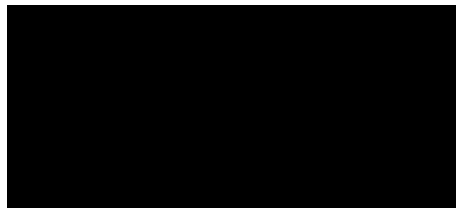
FILE: WAC 01 283 52678 Office: CALIFORNIA SERVICE CENTER Date: **MAR 22 2004**

IN RE: Petitioner:
Beneficiary:




PETITION: Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3)
of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.


Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, California Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a software development and consultancy firm. It seeks to employ the beneficiary permanently in the United States as a computer systems analyst. As required by statute, the petition is accompanied by an individual labor certification, the Application for Alien Employment Certification (Form ETA 750), approved by the Department of Labor.

8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

Eligibility in this matter hinges on the petitioner's ability to pay the wage offered as of the petition's priority date, which is the date the request for labor certification was accepted for processing by any office within the employment system of the Department of Labor. 8 C.F.R. § 204.5(d). The petition's priority date in this instance is March 5, 2001. The beneficiary's salary as stated on the labor certification is \$69,000 per year.

Counsel initially submitted insufficient evidence of the petitioner's ability to pay the proffered wage and of the beneficiary's education. In a request for evidence (RFE) of January 29, 2002, the director required additional evidence to establish the petitioner's ability to pay the proffered wage as of the priority date and continuing until the beneficiary obtains lawful permanent residence. The RFE exacted the petitioner's federal income tax returns for 1999 and 2000 and evidence of the beneficiary's education on the institution's official letterhead and of his baccalaureate degree on the institution's transcript.

Counsel submitted Form 1120, U.S. Corporation Income Tax Return, for fiscal years 1999 and 2000, ending April 30, 2000 and 2001. They related, however, to another party, [C, Inc.], and to employer identification number (EIN) 95-4579403. In any event, they showed taxable income before net operating loss deduction and other deductions of \$55,214 and a loss (\$19,190) for the respective fiscal years, both less than the proffered wage. The petitioner's Form 1120, U.S. Corporation Income Tax Return, for calendar year 1999 reported, under EIN 33-0799296, a loss of (\$3,104), less than the proffered wage. Net current assets, reported on Schedule L of the tax returns, as the difference of current assets minus current liabilities, were a deficit of (\$6,093), less than the proffered wage.

The director observed that no evidence connected the petitioner and C, Inc. as the same party, determined that the evidence did not establish that the petitioner had the ability to pay the proffered wage, and denied the petition.

On the appeal, filed June 24, 2002, counsel submits an Agreement to Merge dated July 12, 2001 (merger) and endorsed as filed with the Secretary of State of California on August 30, 2001. Counsel submits it both as evidence of a merger or the petitioner and C, Inc. and as evidence of no change in the petitioner's operations or EIN. The relationship of the petitioner and C, Inc. remains as impenetrable as ever.

Matter of Ho, 19 I&N Dec. 582, 591-592 (BIA 1988) states:

It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.

Counsel's appeal seeks to clarify by Exhibit 2, a "Certificate of Amendment of Articles of Incorporation," dated February 1, 2001, before the priority date, to show a change of name. The record contains no such numbered exhibit or any document of that date. Counsel does not explain the significance of the change of name.

The assertions of counsel do not constitute evidence. *Matter of Obaighena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980).

The petitioner's Form 1120, presented on appeal, covers the period only to December 31, 2000. It reported taxable income before net operating loss deduction and other deductions of \$6,659, less than the proffered wage. Schedule L reflected net current assets of \$34,079, less than the proffered wage. The federal tax return does not support the ability to pay the proffered wage at the priority date and continuing until the beneficiary obtains lawful permanent residence.

In determining the petitioner's ability to pay the proffered wage, Citizenship and Immigration Services (CIS), formerly the Service or INS, will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Tex. 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), *aff'd* 703 F.2d 571 (7th Cir. 1983).

In *K.C.P. Food Co., Inc.*, 623 F.Supp at 1084, the court held that CIS had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. Finally, there is no precedent that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." See also *Elatos Restaurant Corp.*, 632 F.Supp. at 1054.

The Statement of Operations For the Twelve Months ended December 31, 2000 (the 2000 unaudited financial statement), consists of three (3) miscellaneous sheets without any balance sheet. These papers refer to "an accompanying accountants [Sic] compilation report which is an integral part of this statement," but no such report accompanies the partial unaudited financial statement. Nothing even identifies the accountants and supposed preparers. These fragments offer no credible evidence of the ability to pay the proffered wage. See 8 C.F.R. § 204.5(g)(2), *supra*. The unaudited financial statement is of little evidentiary value, because it is based solely on representations of management.

No evidence at all justifies the ability to pay the proffered wage at the priority date. The petitioner must show that it had the ability to pay the proffered wage with particular reference to the priority date of the petition. In addition, it must demonstrate that financial ability and continuing until the beneficiary obtains lawful permanent residence. See *Matter of Great Wall*, 16 I&N Dec. 142, 145 (Acting Reg. Comm. 1977); *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977); *Chi-Feng Chang v. Thornburgh*, 719 F.Supp.

532 (N.D. Tex. 1989). The regulations require proof of eligibility at the priority date. 8 C.F.R. § 204.5(g)(2). 8 C.F.R. §§ 103.2(b)(1) and (12).

On the appeal, received June 24, 2002, counsel withdraws, as mistakenly submitted, the Forms 1120 of C, Inc. and stipulates that it is merely a “sister company” of the petitioner. In any event, they did not relate to the priority date and did not reveal sufficient funds to pay the proffered wage.

After a review of the federal tax returns, unaudited financial statement, and corporate documents, it is concluded that the petitioner has not established that it had sufficient available funds to pay the salary offered as of the priority date of the petition and continuing until the beneficiary obtains lawful permanent residence.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.